A PROBLEM IN MINING LAW: WALRATH *v.* CHAMPION MINING COMPANY.

THE case[1] which is the subject of this paper fixes the property rights of a locator who has the apex of more than one vein within the lines of his claim. The precise question had not been presented for decision before this controversy arose. The problem attempted to be solved by the decision is one of the most perplexing questions that have arisen under the mining code. The decision briefly stated holds, first, that where two or more veins apex in a claim, the court must decide which vein is the principal vein, and fix the end lines of the claim by reference to that principal vein; second, that those end lines as defined by the principal vein are the end lines for all other veins apexing in the claim; and, third, that the locator owns all the veins having any part of their apexes in his claim, from the apexes downward throughout the entire depth of the veins, within the vertical planes drawn through the ascertained end lines of the claim extended in their own direction.

If this decision announces a proposition of law that is to be adhered to, it has unsettled certain doctrines of mining law which have heretofore been accepted without question. It is the aim of this article to attempt to point out what the opinion has really decided, and then to examine whether the results attained are reconcilable with principles heretofore received as almost axiomatic.

A prospector making a discovery of a metalliferous vein upon the unappropriated mineral lands of the United States has the right to locate a mining claim upon his discovery. It was believed among all classes engaged in mining, as well as among mining lawyers, that the locator by making a proper location upon his discovery acquired the right to mine his vein from its apex downward, so long as he confined his workings within vertical planes drawn downward through what the law defined to be the end lines of his claim, provided he did not obtrude within the planes of the end lines of some older location which owned that particular

[1] Walrath *v.* Champion M. Co., 171 U. S. 293.

portion of the vein by reason of its ownership of the apex. But this common belief has been shown to be not justified under a peculiar state of facts by this decision of the Supreme Court of the United States, the ultimate authority upon such questions. The opinion was delivered May 31, 1898, and it was concurred in by a unanimous court. It advanced propositions which at first blush seem a radical departure, in that a mining claim was given a portion of a vein the apex of which portion was not covered by the claim but was clearly outside the claim.

The statute of the United States[1] which governs the rights of claimants of veins, as distinguished from placers, gives to

"the locators of all mining locations heretofore made or which may hereafter be made . . . so long as they comply with laws of the United States, and with state, territorial, and local regulations not in conflict with laws of the United States, . . . the exclusive right of possession and enjoyment of all the surface included within the lines of their locations and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior part of such veins or ledges."

All mineral patents of the United States grant this right to follow the vein outside the side lines within the end line planes, and all mining lands granted by patent are subject to this right of extra-lateral pursuit of the owners of adjoining locations.[2]

Before passing to the case under examination, it may not be amiss to define a few common terms of mining law, so far as a definition is needed for this discussion. All veins or lodes are conceived to be more or less tabular in form, or as sheets of mineral-bearing substance of varying thickness found in the earth's crust. The apex of a vein means that terminal edge of the vein which approaches nearest to the surface of "rock in place," *i. e.*, the unbroken mass of the earth as distinguished from surface wash,

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[1] Rev. Stat. sec. 2322.

[2] A mineral patent is read just as if the statute were written in it, whatever the terms of the patent may be. Walrath *v.* Champion M. Co., 171 U. S. 305.

or float, or the material of detrition. The strike, or onward course of a vein, is its longitudinal direction across the country. If the vein outcrops on the surface, this strike is shown by the course the vein takes on the surface. But the true strike of a vein is a horizontal line, the line of a level run in the vein and lengthwise the vein.[1] The dip of a vein is its extension in depth, the "course downward" and "depth" of the statute, and is, for any particular place on the vein, the steepest inclination downward of the vein into the earth. The dip is spoken of as easterly or westerly or some other compass direction, or as being of so many degrees, which means so many degrees from the horizontal. Thus, a vein going into the earth toward the east at an angle of sixty-five degrees from the horizontal is said to dip easterly sixty-five degrees. Mathematically, the dip must be at a right angle to the true strike. The term "extra-lateral" refers to the right given by statute to pursue a vein outside the segment of the earth defined by the surface lines of the claim.

The following diagram, taken from the reports of the case,[2] shows the situation of the contesting claims, the portions of the vein in dispute, the end lines claimed by the respective parties, the courses of the veins, and the lines as fixed by the three courts which in turn passed upon the case. Careful reference is required to be made to this diagram in order to comprehend the points involved.

Walrath, the complainant, as owner of the Providence, brought suit in the Court below against the Champion Company, as the owner of the New Year's and New Year's Extension. The relief sought was the establishment of the rights of the Providence claim in the vein called the Contact, and an accounting for ores extracted from that vein by the Champion Company.

There were two veins in the Providence, both dipping easterly, — one a fissure vein in granite called the Providence lode; the other a vein on the contact of the slate and granite formations, called the Contact, or Back vein. The Providence was the oldest loca-

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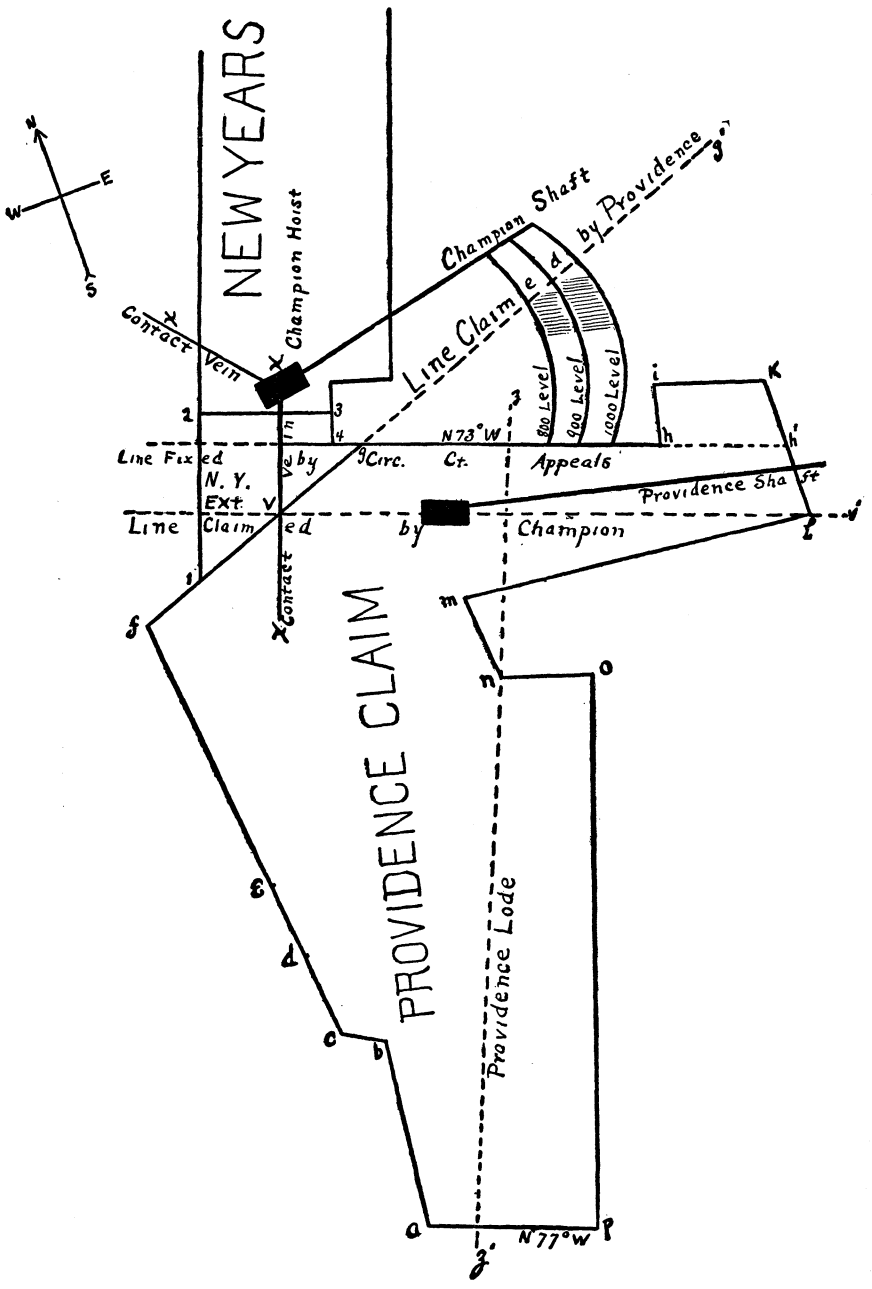
[1] Flagstaff M. Co. *v.* Tarbet, 98 U. S. 463. This horizontal line may be straight or broken or curved. It varies in direction with the lengthwise direction of the vein.

[2] In the Circuit Court, 63 Fed. Rep. 552. The diagram in this case shows the levels of the Champion and the courses of the end lines of the Providence, and is fuller than the plat, in the Supreme Court report. In the Circuit Court of Appeals, 72 Fed. Rep. 978. The diagram here given is the same as that given in the Court below. In the Supreme Court, 171 U. S. 293. Two diagrams are found in this report.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Providence Shaft
Line Claimed by Champion
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PROVIDENCE CLAIM
Providence Lode
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tion. It was located in 1857 before there was any mining statute, when the customs of miners were controlling and were recognized by the courts.[1] The claim was patented under the law of 1866, which was the first mining statute.[2] Under this patent the Providence obtained but the one lode, the Providence lode, which is the vein indicated by the line $z z'$.[3] The end lines of the Providence, $g h$ and $a p$, which are the lines crossed by the Providence lode, are not parallel; one line runs north seventy-seven degrees west, the other north seventy-three degrees west. By the act of 1866, parallelism of end lines was not necessary to extra-lateral rights,[4] but such parallelism is required by the statute of 1872,[5] before extra-lateral rights accrue.[6] But under the act of 1872 the owner of the Providence gained rights in the Contact vein, for the section quoted from the statute gave to him all other veins, the top or apex of which lay within the patented area.

The New Year's Extension, outlined by 1, 2, 3, 4, g, was located under the act of 1872, which required parallel end lines as a prerequisite to extra-lateral rights,[7] but whether that claim was entitled to extra-lateral rights was immaterial.

The diagram indicates the ore bodies more particularly in dispute as lying between the 800 and 1000 foot levels run southerly from the Champion shaft. They are shown in the triangle formed by the line claimed by the Providence and the line claimed by the Champion. These ore bodies are outside the lines of both the plaintiff's and the defendant's ground. The pleadings also put in issue the ownership of the Contact vein at its apex in the New Year's Extension.

A fact most important to note is that the action was brought by Walrath as the owner of the Providence. His sole claim was based upon his ownership of that claim, and he was relying upon

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[1] Sparrow *v.* Strong, 3 Wall. 97; Jennison *v.* Kirk, 98 U. S. 453; Del Monte M. Co. *v.* Last Chance M. Co., 171 U. S. 55, 62.

[2] 14 Stat. 251.

[3] The statute provided that but one lode could be obtained by the patent. See 171 U. S. 305.

[4] Eureka M. Co. *v.* Richmond M. Co., 4 Sawy. 302; Argentine M. Co. *v.* Terrible M. Co., 122 U. S. 478; Carson City M. Co. *v.* North Star M. Co., 83 Fed. Rep. 658; Del Monte M. Co. *v.* Last Chance M. Co., 171 U. S. 55.

[5] Rev. Stat. sec. 2320.

[6] Flagstaff M. Co. *v.* Tarbet, 98 U. S. 463; Argentine M. Co. *v.* Terrible M. Co. 122 U. S. 478; King *v.* Amy M. Co., 152 U. S. 222.

[7] Flagstaff M. Co. *v.* Tarbet, 98 U. S. 463; King *v.* Amy M. Co., 152 U. S. 222; and see all the cases cited in the last note but one.

his ownership of an apex, and upon the continuity of his vein from an apex in his Providence claim to the portion of the vein in dispute. The easterly portion of the vein where it was disputed, so far as ore is indicated, lay outside both defendant's and plaintiff's claims. Hence there was no question involved as to any common law presumption giving to the owner of the surface all vein beneath the surface, until an apex for that portion of the vein was shown outside the claim, whose lines include that portion of the vein.[1] It is apparent that for Walrath to recover he must show that the disputed portion of the vein lay within the vertical planes of the end lines, defining his extra-lateral rights on the Contact vein. It was conceded that the portion of vein in dispute was in the Contact vein, and there was no controversy as to the situation of the apex of that vein. It followed that unless Walrath could show the disputed portion of the vein to be within his end line planes, judgment must go for the defendant. This conclusion, however, would not affirm that the defendant owned the disputed portion of the vein, or that the subject of contention was covered by the extra-lateral rights of his New Year's Extension. The existence of extra-lateral rights upon the New Year's and New Year's Extension, and the extent thereof, were questions wholly immaterial to the issue. The sole question to be settled was the northerly end line plane of the Providence.

The Circuit Court announced the general principle that end lines of the claim must be the same for all veins apexing therein, but departed from its principle by projecting the northerly end line plane of the Providence vertically along the broken line *f g h*, being the end line and a side line of the Providence.[2] In other words, that end line plane was not a plane, but two planes of varying directions. This decision gave all that portion of the Contact vein along the apex from the point *v* to the line *g h* extended westerly in its own direction down to the vertical plane through the line *f g* to the New Year's Extension. This amount according to the scale was more than 100 feet of apex.

The Circuit Court of Appeals affirmed the general principle, but fixed the northerly end line plane of the Providence along the line *g h* extended in its own direction both westerly and easterly.[3] It

[1] For the effect of the common law presumption, see Iron Silver M. Co. *v.* Elgin M. Co., 118 U. S. 196; Jones *v.* Prospect M. Co., 31 Pac. Rep. 642; Consolidated M. Co. *v* Champion M. Co., 63 Fed. Rep 540, 550.

[2] Walrath *v.* Champion M. Co., 63 Fed. Rep. 552, 558.

[3] Walrath *v.* Champion M. Co., 72 Fed. Rep. 978.

gave that portion of the Contact vein along the apex from the point *v* to the line *g h* extended westerly in its own direction, to the Providence, and in consequence all that portion of the vein upon its dip went to the Providence.[1] That portion of the apex just described lies outside the surface lines of the Providence. The Supreme Court concurred in the general principle and affirmed the ruling of the Circuit Court of Appeals.[2] But since Walrath alone appealed the Supreme Court had no jurisdiction to reverse the decision as to the portion of the vein last mentioned.

Prior to these decisions, the only ruling upon this question was a *dictum* of Judge Field in Iron Silver M. Co. *v.* Elgin M. Co.[3] And when the *dictum* is closely examined it simply says that the rights of the locator for all veins in his location cannot go beyond the planes of his end lines. It does not affirm, what Judge Hawley thought it did,[4] namely, that the right of the locator upon every vein in his claim extended up to the end lines.

It will be useful to consider the law of apex as adjudicated in various other decisions in regard to single veins in a claim. Under the laws of 1866 and 1872, the locator obtains no extra-lateral or other rights upon any portion of the vein, whose apex is outside the surface lines of his clain.[5] It was never before suggested that there could possibly be a case contrary to this rule. If the apex crossed both end lines and between those lines was, for any part

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[1] By a reference to the line claimed by the Providence, as shown in the diagram, it will be seen that the Providence made no claim to that portion of the apex.

[2] Walrath *v.* Champion M. Co., 171 U. S. 293, 312.

[3] 118 U. S. 196, 209. It is apparent that the Justice was combating the doctrine contended for in the dissenting opinion of Chief Justice Waite and Justice Bradley, to the effect that the end lines of a mining location, regardless of the end lines marked by the locator, are to be fixed by the court by projecting parallel end lines crosswise the general course of the vein at the extreme points where the apex leaves the location as marked on the surface. However easy of application such a rule would be to a vein having a substantially straight onward course, it was a practical impossibility as applied to the vein in that particular case, for the course of the apex described a "horse-shoe." See 118 U. S. 203, for the diagram. It may be conceded that Judge Field amply demonstrated the weakness of the view of his dissenting brethren, but in the eagerness of argument he enunciated a general principle as controlling a most difficult question which was not being argued before the court and which it was not necessary to decide, for there was no question in the case involving more than one vein in a single claim.

[4] See 63 Fed. Rep. 558, where the language of Judge Field is quoted.

[5] Del Monte M. Co. *v.* Last Chance M. Co., 171 U. S. 55, 91, decided at the same time as the case of Walrath *v.* Champion; and singularly enough the Walrath case reaffirms the other case.

of it,[1] continuously along its strike within the claim, the whole of the vein on its dip belonged to the claim within the end line planes. If, however, the apex departed over a side line and then returned to the claim, no extra-lateral or other right existed as to that part of the vein apexing wholly outside of the claim.[2]

The case just put is one of end lines fixed by the locator. But there are cases where one or both end lines must be projected by the courts according to the equity of the statute.

(*a*) If the apex crosses both side lines, those side lines become end lines,[3] but in a case where the apex crossing both side lines courses or strikes more with the length of the claim than across it, *i. e.*, if the angles made with the side lines are less than forty-five degrees, it is said that end lines parallel to the located end lines are to be drawn at the points where the apex departs from the side lines of the claim.[4] (*b*) If the apex crosses an end line and a side line, the end line crossed is one end line and the other end line is to be drawn parallel thereto at the extreme point of apex departure on the side line,[5] and this rule is applied to every such case.[6] (*c*) If the apex crosses an end line and is terminated in the claim, the crossed end line is one end line, and another end line parallel to it is drawn at the point of termination.[7] (*d*) If the apex crosses in and out of the claim on the same side line, end lines parallel to the located end lines are drawn at the points of final departure.[8] (*e*) If the apex crosses neither line of the claim, it is suggested that end lines be drawn parallel to the located end lines, giving the locator

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[1] There are cases of an apex split along the strike of the vein by a side line. In such cases the older location takes the whole vein. Bullion M. Co. *v.* Eureka M. Co., 5 Utah, 3; Empire State M. Co. *v.* Bunker Hill M. Co., 114 Fed. Rep. 417; 106 Feb. Rep. 471; Argentine M. Co. *v.* Terrible M. Co., 122 U. S. 478 (*dictum*).

[2] Waterloo M. Co. *v.* Doe, 82 Fed. Rep. 45.

[3] Flagstaff M. Co. *v.* Tarbet, 98 U. S. 463; King *v.* Amy M. Co., 152 U. S. 222; Del Monte M. Co. *v.* Last Chance M. Co., 171 U. S. 55. The second case cited in this note is opposed to the cases cited in the next note.

[4] Last Chance M. Co. *v.* Tyler M. Co., 61 Fed. Rep. 559; Consolidated M. Co. *v.* Champion M. Co., 63 Fed. Rep. 540. See the language of Brewer, J., 171 U. S. 90, 91, confirming this point.

[5] Del Monte M. Co. *v.* Last Chance M. Co., 171 U. S. 55, 91, citing several decisions.

[6] Brewer, J., 171 U. S. 89.

[7] Carson City M. Co. *v.* North Star M. Co., 73 Fed. Rep. 597, affirmed 83 Fed. Rep. 658.

[8] St. Louis M. Co. *v.* Montana M. Co., 104 Fed. Rep. 664, citing the former decision in the same case, 102 Fed. Rep. 430. Catron *v.* Old, 23 Colo. 441, *contra*, no longer authority.

as much length of vein on the dip as he has length of apex within his claim.

The case not noted is that of a vein crossing in over a side line and terminating before reaching any other line of the claim. But the spirit of the decisions would probably require the crossed side line to be one end line, and another end line parallel thereto to be drawn at the point of termination within the claim, unless the course of the vein in the claim was more with than across it.

It appears therefore from all the decisions that the law is conceived to require, except in one very peculiar case, that a locator should be given the same length of vein on dip as he has length of apex; but every one of these decisions is based upon the idea that the locator should not be given any part of a vein whose apex is outside his surface lines.

If, then, we suppose that the Contact vein were the only vein in the Providence, the solution of the case required, first, the designation of the end lines of the Providence. Clearly, as the courts held, they were the lines *g h* and *a p*, because they were the two extreme lines defining the ends of the claim, which were crossed by a vein or veins. The end lines being settled, the second question that arose was as to whether the Providence had extra-lateral rights. The court so assumed, and so far as the reports show, the point seems to have been conceded by the defendant.[2] But the Providence patent and original location gave rights only in the Providence lode. The Contact vein was granted to it solely by the law of 1872. But as a prerequisite to acquiring extra-lateral rights under that law, the claim must have parallel end lines. Since the end lines of the Providence were not parallel, it perhaps would follow that the claim gained no extra-lateral rights on the Contact vein. But the two end lines are substantially parallel, for they differ in direction only four degrees, and this objection may be considered obviated. The Circuit Court of Appeals expressly held the Providence to be entitled to follow the Contact vein extra-laterally.

If the Providence is entitled to extra-lateral rights on the Contact vein, the decision may be considered as an authority for the

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[1] Tyler M. Co. *v.* Sweeney, 54 Fed. Rep. 292 (*dictum*); Del Monte M. Co. *v.* New York M. Co., 66 Fed. Rep. 212 (*dictum*); Tyler M. Co. *v.* Last Chance M. Co., 71 Fed. Rep. 848 (*dictum*); Del Monte M. Co., *v.* Last Chance M. Co., 171 U. S. 55, 89 (*dictum*).

[2] Mr. Curtis H. Lindley, counsel for the Champion, so concedes. 2 Lindley on Mines, 743.

proposition that if the claim is entitled to extra-lateral rights on the principal vein, it is so entitled upon all the veins in it. Or we may look at the decision in another way. The Contact vein is developed for merely a short distance in the Providence. It may be presumed to cross out over the same side it entered upon. If so, this case affirms the decision of the Circuit Court of Appeals in the cases cited as to such an apex. Or the apex may be presumed to terminate in the claim. If that be so, this case affirms the decision of the Circuit Court of Appeals in the cases cited as to that form of apex occurrence.

Conceding, then, the extra-lateral rights of the Providence on the Contact vein, if it were considered as the only vein in the claim, the decisions would require that through the point *v* an end line plane should be projected parallel to the end line *g h*. This is the line claimed by the Champion, and the defendant was entitled to judgment, since plaintiff's rights on the dip did not reach any portion of the vein for which suit was brought.

The courts, however, rejected this theory of the law, because there were two veins in the Providence. It may be conceded that, under the peculiar facts of this case, it was possible for the court to say that one vein was principal and the other subsidiary. But it was wholly an accidental circumstance that the claim had been patented upon the Providence lode under the law of 1866, and had afterwards been granted the Contact vein by the law of 1872.

The latter law places all veins in a claim on the same level. There is no principal and no subsidiary vein. Since one lode and only one could be patented under the law of 1866, and since that lode was required to be named in the patent, the diagram annexed to the patent contained a lode line designating the course of the lode named in the patent. It is true that the draughtsmen of the Land Office, after the law of 1872, forgetting that the latter law patented a surface and all lodes therein, continued to indicate a lode line in the patent. But the lode line meant nothing. The patent conclusively proved a vein to be in the ground, but the lode line did not prove that there was any particular lode in the patented area at any particular place, or that the lode indicated by the lode line was at that place.[1] It is believed that the patents now being issued do not contain any lode line.

Hence it is that any attempt to fix a principal vein in regard to locations under the law of 1872 is so illusory. The difficulties that

[1] Consolidated M. Co. *v.* Champion M. Co., 63 Fed. Rep. 540, 551.

would arise in the latter case, where there were two or more veins in a claim, must be extraordinary. Suppose a vein to be discovered and a location made upon that discovery in such a way that the apex crosses an end line and a side line midway the claim. If the claim is 1500 feet long, the locator has but 750 feet of apex, and his end lines would be made that far apart. But suppose that later another vein is discovered crossing both end lines of his location and coursing within his claim for the whole length of it. On this latter vein he is entitled to 1500 feet of vein. Who is to say which is the principal and which the subsidiary vein? Is priority of discovery to be the criterion? If so, the locator would lose on the second vein 750 feet of vein, which the law expressly gives him, if this Walrath case announces a correct principle. The obstacles to a search for a principal and a subsidiary vein under the law of 1872 seem to be insuperable.

The second proposition advanced by the court, to wit, that the end line planes for every vein in the claim must be the same, is no less untenable. Assume that the Providence claim is located and patented, and the New Year's Extension non-existent. A locator coming upon the ground would find a wholly unoccupied apex from the point *v* to the line *g h*, extended in its own direction westerly. The express words of the statute permit him to locate it. This case affirms that the locator would get nothing, because that portion of the vein belongs to the Providence.

Again, assume that the Contact vein passes out of the Providence at *v* and turns westerly upon its strike, dipping southerly. It is apparent that the plane of the line fixed by the Circuit Court of Appeals will never cut the Contact vein. Yet this decision says that all of that vein, southerly of the line fixed by the Circuit Court of Appeals, so far as the vein is developed, belongs to the Providence. If that is true, in the case last supposed, the Providence would own the Contact vein westerly of the point *v* until the vein ceased upon its strike. Is it conceivable that in such a case the court would have rendered this decision or affirmed its general principle?

Suppose a second case. It is wholly possible that the Contact vein might go out of the Providence across the line *c d*, and then extend northerly for a long distance, practically parallel to the west side of the Providence, but outside the Providence. The result of the decision would be that all of the Contact vein outside the Providence until the point was reached, where that vein was

cut by the line fixed by the Circuit Court of Appeals, would belong to the Providence. That distance would be over 1500 feet, and the astonishing result of this case is that that 1500 feet of apex and vein would belong to a claim which did not cover that length of apex in any way; for if the decision is correct when applied to 50 or 100 feet of apex, it must be none the less correct when applied to 1500 feet of apex.

Let us test the decision by a third case. It is a possible, though not a usual, thing for a vein to go into the earth vertically. Imagine the Contact vein from the point *v*, where it leaves the Providence, to the point where it is cut by the line fixed by the Circuit Court of Appeals, — and that is the portion of the vein that is expressly declared to belong to the Providence, — imagine that portion of the vein to be vertical. On its course downward that portion of the vein would always be under the New Year's Extension, and that portion necessarily both in length and in depth would be within the surface lines of the New Year's Extension. No mining engineer, however elastic his conscience, would dare to say that the apex of that length of the vein was not in the New Year's Extension. The law expressly says that if that be the case, such portion of the vein belongs to that claim. Yet this decision holds that it belongs to the Providence. If the Contact vein had been a vertical vein, it is inconceivable that the court would have decided the case as it did.

The decision is all the more strange when one recalls the words of another case in this same volume of reports. The court there say:[1] "Upon the fact that an apex is within his surface lines, all his [the locator's] underground rights are based. When, then, he owns an apex, whether it extends through the entire or through but a part of his location, it should follow that he owns an equal length of the ledge to its utmost depth." But the Walrath decision gravely propounds a case where the locator has an apex within his surface through his entire location, and has the undisputed and conceded right to that surface, and yet does not own that very portion of apex which he has covered.

We may put another case. Assume that the apex of the Contact vein entered the Providence across the line *e f*, and then proceeded easterly cutting the lode line, and crossed out of the claim over the line *o p*. There are decisions of courts based upon an express statute which say that such a vein cannot belong to the

[1] 171 U. S. 91.

Providence beyond the planes of the lines *e f* and *o p*.[1] Whether those side lines are end line planes for such a cross vein, so as to give extra-lateral rights upon the cross vein, is a very different question, but its solution is not germane to this discussion. Suppose, however, that the crossing vein does not cut a vein running a part of the length of the claim. In such a case of crossing, it is absolutely certain that the principle of the case we are discussing cannot apply.

But one other hypothetical case needs to be suggested. Conceive that the Contact vein entered the Providence where it is shown to enter, and then proceeded until it joined the Providence lode, and thence southerly the two veins were identical. Such a situation would present an instance of a vein forking or splitting upon its strike. North of the point of junction the two veins are wholly separate and distinct; one vein in the case supposed would depart from the Providence at *z*, the other at *v*. This very case was presented to the Circuit Court of Appeals of the Eighth Circuit, and a unanimous court, after full consideration, held that in such a case each fork would have its own end line.[2] It shows that for the one vein there is one end line and for the other vein a totally different end line, and it never occurred to the eminent mining counsel engaged in that case to contend that a claim could own an apex wholly outside the claim.

From these hypothetical cases it appears that not only is this Walrath case impossible of application, but that it is contrary to the terms of the statute. Judge Hawley, who decided the case in the Circuit Court, is a judicial officer of the widest experience and highest reputation in mining cases. He saw the impossibility of giving to the Providence a portion of a vein of which it had not the

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[1] Such a vein is a cross vein. One set of cases maintains that the cross vein from side line to side line of the older claim belongs to the older claim. Other cases say that merely the space of intersection of the two veins belongs to the older claim. Hall *v.* Equator M. Co., 11 Fed. Cas. No. 5931, *dictum;* Branagan *v.* Dulaney, 8 Colo. 408; Lee *v.* Stahl, 9 Colo. 208; 13 Colo. 174; Oscamp *v.* Crystal River M. Co., 58 Fed. Rep. 293, citing other Colorado cases. But for the present law of Colorado see Calhoun M. Co. *v.* Ajax M. Co., 27 Colo. 1, 59 Pac. Rep. 607. Compare Pardee *v.* Murray, 4 Mont. 279. It is probable that the courts have mistaken the meaning of the statute. Watervale M. Co. *v.* Leach, 33 Pac. Rep. 418; Wilhelm *v.* Silvester, 101 Cal. 358. It was intended to apply to veins crossing or intersecting only on dip and not on strike, but it is now too late so to contend.

[2] Colorado Central M. Co. *v.* Turck, 50 Fed. Rep. 888, 898. This case leaves in doubt whether the side line crossed would become an end line or whether, at the point of crossing on the side line, an end line would be drawn parallel to the end lines.

apex, but in deference to a *dictum* of Judge Field, he was driven to making the end line plane of the Providence a broken plane, thus increasing the length of vein given to that claim as the vein descended into the earth. The higher courts were appalled by the hopeless incongruity of such an end line, but their conclusion is no less indefensible.

It is probable, too, that the apparent injustice of the line claimed by the Champion weighed upon the courts. If that line had been affirmed by the decision, the Champion Company would have taken, perhaps, not only a portion of the Providence shaft, but also the greater part of its underground workings. In an attempt to avoid such a result, the courts made, it is suggested with deference, an erroneous ruling.

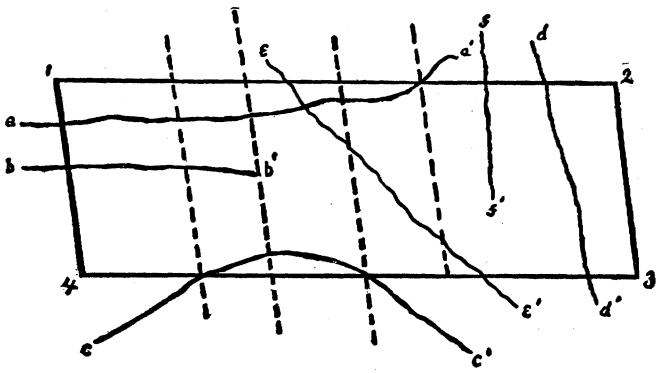
But is there any rule that is capable of application to all cases of plurality of veins in claims located under the act of 1872 ? It is believed that such a rule can be formulated. We may leave out of view cross veins which actually cross some other vein, for they are governed by another statute. It is apparent that if all the veins are crosswise the claim, no difficulty would arise. If one vein is lengthwise and the other crosswise the claim, the cross vein will always be a statutory cross vein, except in those peculiar cases where the crossing vein terminates before it reaches the vein running lengthwise, or the lengthwise vein terminates or passes out over a side line before it reaches the vein running across the location.

With such veins eliminated there would remain veins crossing both end lines, veins crossing an end line and a side line, veins crossing in and out on the same side line, veins crossing an end line and terminating in the claim, and veins crossing no line of the claim. The rule would be that no vein could have extra-lateral rights beyond the planes of the end lines as marked by the locator. For each particular vein fix the extra-lateral rights upon it according to the rules now laid down in the decisions. Every end line plane for any vein in the claim would necessarily be parallel to the end lines of the claim. If those end lines as fixed by the locator be not parallel, no extra-lateral rights would exist in regard to any vein. Such a rule would be reconcilable with the law as it has been settled by decisions. This Walrath case could be disposed of by saying that it is applicable solely to claims located and patented under the law of 1866.

The effect of the rule suggested may be better seen in the follow-

ing diagram, representing a number of possible occurrences, all in one claim.

Let the figure 1, 2, 3, 4 represent a mining claim, with one apex $a\,a'$ crossing an end line and side line, another apex $b\,b'$ crossing an end line and terminating in the claim, another apex $c\,c'$ crossing in and out on a side line, another apex $d\,d'$ crossing both side lines, but crossing no other vein, another apex $e\,e'$, an actual cross vein, and another apex $f\,f'$, a crossing vein cutting only one side line. The various broken lines drawn at the points of departure of the veins $a\,a'$, $b\,b'$, $c\,c'$, represent the planes governing the extra-lateral rights of the claim on the respective veins. The claim obtains no extra-lateral rights on any portion of apex which is not contained within the surface lines of the claim. The apex $e\,e'$ is a



statutory cross vein, governed by the cross vein statute. It is impossible, however, to make any rule to govern the right of the claim on the veins $d\,d'$, $f\,f'$. The decisions say that the side lines would be end lines, and if that rule is to be applied, it is not possible to draw planes for them parallel to the end lines, and such veins must be an exception to any rule.

If an attempt is made to apply to the above situation as outlined in the diagram the court's rule that the end line bounding planes for all veins in a claim must be the same, it is at once seen that the rule cannot be applied without giving the claim apexes that it does not cover. In such a situation the difficulty of identifying the principal vein seems equally hopeless.

The rule suggested above has singularly enough been followed by the same Circuit Court of Appeals, which decided the Walrath case, without even noticing the contrary rule, which it had estab-

lished. In Montana M. Co. *v.* St. Louis M. Co.[1] that court, with the same judges sitting, had before it a case where a claim, the St. Louis, had in it two veins. The one vein, called "Discovery," ran the full length of the claim crossing two parallel end lines.[2] The other vein, called "Drum Lummon," entered and passed out of the claim on a side line.[3] It is apparent that under the Walrath case the St. Louis claim took all the Drum Lummon vein for the full length of apex between the end line planes of the St. Louis claim. But the court held, in its second decision in the case,[4] that the extra-lateral rights of the St. Louis claim upon the latter vein were limited by end line planes drawn parallel to the end lines of the claim and through the points of extreme departure of the latter vein. Hence it held that the end line planes for the Drum Lummon vein were different from the end line planes for the other vein in the claim. It was not suggested to the court that it was violating the rule laid down in its former decision,[5] which had been affirmed by the Supreme Court.[6] The court does not seem to have recalled the principle of its former decision, but said that "the entire vein [Drum Lummon] must be considered as apexing upon the senior location [the St. Louis] until it has wholly passed beyond its side line," but no further. And the court gave to the second location all of the apex within its lines, outside the side line of the St. Louis, although that portion was within the end line planes defining the extra-lateral rights of the St. Louis claim on the other vein. This decision is the best possible commentary on the Walrath case, and affords a complete refutation of the rule laid down in it.

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[1] 102 Fed. Rep. 430.

[2] 102 Fed. Rep. 432; 104 Fed. Rep. 665.

[3] See diagram, 104 Fed. Rep. 665.

[4] St. Louis M. Co. *v.* Montana M. Co., 104 Fed. Rep. 664, 669. It may have been an oversight on the part of the attorneys for the St. Louis that they did not cite the Walrath case and did not claim any more than the court gave them. But that would not justify the court in disregarding a principle which it had expressly held to be all controlling.

[5] Walrath *v.* Champion M. Co., 72 Fed. Rep. 978.

[6] Walrath *v.* Champion M. Co., 171 U. S. 293.